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No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, ET AL.,
Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, EN BANC

APPELLANTS' REPLY TO MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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ARGUMENT

I.

THIS COURT HAS JURISDICTION PURSUANT TO 2 U.S.C. § 437h

Despite the fact that the Seventh Circuit has twice upheld the plaintiffs' standing under 2 U.S.C. §437h,[1] the FEC has argued that this Court lacks subject matter jurisdiction because the plaintiffs are not among the parties explicitly enumerated in 2 U.S.C. §437h. *See* "Motion Of The Federal Election Commission To Dismiss The Appeal Or In The Alternative To Affirm" at 4. That section provides in pertinent part that:

> "(a) The Commission, the national committee or any political party, or any individual eligible to vote in any election for the Office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

Relying on a hyper-literal parsing of §437h, the FEC contends that the availability of §437h is a function not of the nature of the challenge to the Act, but rather solely of the identity of the particular plaintiff. Under this view, only the Commission, the national committee of any political party, or any individual eligible to vote in any election

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[1] *See* Bread Political Action Committee v. Federal Election Commission, 591 F.2d 29 (7th Cir. 1979); Bread Political Action Committee v. Federal Election Commission, ___ F.2d ___ (7th Cir. 1980) (En Banc) (Appendix to Jurisdictional Statement at 8). For the convenience of the Court, we have reproduced the first *BreadPAC* opinion (591 F.2d 29) as an Appendix, *infra*.

for the Office of President may invoke §437h in order to challenge the constitutionality of the Act. Since the instant plaintiffs do not fall within the explicit language of §437h, the FEC concludes that they lack standing to invoke §437h's provisions, and that this Court is without subject matter jurisdiction. For the reasons so carefully explicated in *Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979) which reasons were affirmed unanimously in *Bread Political Action Committee* v. *Federal Election Commission*, ... F.2d ..... (7th Cir. 1980) (En Banc), this contention must be rejected.

It is fundamental that the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Supreme Court so largely depends for illumination of difficult constitutional questions. *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

It is difficult to imagine anyone more personally affected by, or interested in, the provisions of the Act dealing with trade associations and their political action committees than trade associations themselves. Yet, acceptance of the FEC's construction of § 437h would permit parties having no real and substantial interest in matters affecting trade associations to seek judicial review of the Act's trade association provisions but would deny that right to those most directly and substantially affected by the Act. Since in enacting § 437h Congress sought to insure prompt evaluation of the constitutionality of basic structures of the Act,[2] it would not have denied standing to the class

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[2] *Buckley* v. *Valeo*, 387 F. Supp. 135, 138, 141 (D.D.C. 1975); *Buckley* v. *Valeo*, 519 F.2d 817, 819 (D.C. Cir. 1975) (". . . The intention of Congress [in enacting § 437h was] for expedition in appellate disposition."). *BreadPAC* v. *FEC*, App. *infra*, at 4-5; 8-9; 11-12, n.9.

most intimately affected. For prompt evaluation of those basic provisions of the Act dealing with trade associations would surely not result if *only* the Commission, the national committee of a political party or some independent voter had standing to seek expedited judicial review in the Courts of Appeals. *See Bread PAC* v. *FEC*, App. *infra*, at 4-5; 9-11.

It is fatuous to suggest either that some anonymous individual voter or the national committee of a political party would contest the Act's trade association provisions, and it is idle to contend that the Commission could lawfully, *see* App. *infra* at 10, n.6, or would ever raise a constitutional challenge to the Act upon which it depends for its very sustenance. In short, acceptance of the FEC's construction of § 437h would subvert rather than achieve the goals subserved by that section.[3] *See* App. *infra* at 8-11.

Lingering doubts about the Congressional intent underlying § 437h are silenced by an examination of *Buckley* v.

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[3] There exists the very substantial question whether the latter two classes of plaintiffs enumerated in 437h could in fact maintain an action contesting the Act's trade association provisions. While Congress has the power to accord standing to parties who might otherwise be barred by the Court's "prudential" rules relating to standing, it cannot, by virtue of the case or controversy requirement of Article III, accord standing to a potential litigant who cannot allege and prove a distinct and palpable injury to himself. *See, Warth* v. *Seldin*, 422 U.S. 490, 498-501 (1975). Since it is unlikely that, with the possible exception of the Commission, any of the parties enumerated in § 437h could demonstrate such an injury resulting from the Act's trade association provisions, acceptance of the FEC's construction of 437h could theoretically result in a situation in which no one would have standing to initiate judicial review of the Act's trade association provisions under the Declaratory Judgment Act. *See BreadPAC* v. *FEC*, App. *infra* at 10-11.

Valeo, 424 U.S. 1 (1976). *Buckley* involved a challenge to the Federal Election Campaign Act made by "a candidate for the Presidency of the United States, a United States Senator who [was] a candidate for re-election, a potential contributor, the Committee for a Constitutional Presidency —McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc." *Id.* at 7-8. In addition, leave to intervene was granted to the "Center for Public Financing of Elections, Common Cause, the League of Women Voters of the United States, Chellis O'Neal Gregory, Norman F. Jacknis, Louis D. Widers, Daniel R. Noyes, Mrs. Edgar B. Stern, Charles F. Taft, John W. Gardner, and Ruth Clusen." *Id.* at 9, n. 5.

Despite the fact that the overwhelming majority of the plaintiffs and intervenors were *not* within the parties enumerated in § 437h, this Court held that "at least some of the appellants [had] a 'sufficient personal stake' in a determination of the constitutional validity of the Act. . . ." *Id.* at 12. *Immediately* after this statement appeared the following footnote:

> "This Court has held, for instance, that an organization 'may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation.' NAACP v. Alabama, . . . Bates v. Little Rock, ..." *Id.* at 12, n. 10.

This reference to the organizational rather than to the individual plaintiffs takes on heightened significance when one recalls that the *district court's* invocation of § 437h seemed to have been predicated solely on the fact that among the plaintiffs were individuals who were eligible

voters and thus fell within the literal language of § 437h.[4] This Court, however, manifestly ignored the fact that there were voter-plaintiffs and focused instead, in note 10, on the institutional plaintiffs who, under the government's view here, would not have standing to seek review pursuant to § 437h.

Given the district court's inordinate preoccupation with the status of the individual plaintiffs, unless we are to ascribe to this Court an exceedingly high degree of caprice the focus on the organizational, rather than the individual, plaintiffs in note 10 of the *Buckley* decision must be construed to mean that the availability of § 437h(a) is not limited merely to the three classes of plaintiffs enumerated in that Section. *See* App. *infra* at 11-14; 16.

Other portions of the *Buckley* decision also conclusively demonstrate that the FEC's reading of § 437h is incorrect. It is obvious that restricting the availability of judicial review under §437h only to the Commission, the national committee of a political party, or a voter would *not* provide judicial review to the extent permitted by Article III. Yet, the Court in *Buckley* unequivocally stated that "[*i*]*t is clear that Congress in enacting 2 U.S.C. § 437h . . . intended to provide judicial review to the extent permitted by Article III.*" 424 U.S. at 11-12. (Emphasis supplied). *See* App. *infra* at 14; 16.

Finally, the Seventh Circuit's meticulous opinion in the first *BreadPAC* case demonstrates that Congress did not intend to prohibit judicial review under §437h merely because constitutional challenges to the Act could be raised

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[4] *See, Buckley* v. *Valeo,* 387 F. Supp. 135, 142 n. 14 (D.D.C. 1975).

defensively by defendants in enforcement proceedings brought by the Commission pursuant to 2 U.S.C. §437g. Indeed, as the Seventh Circuit conclusively proved, it is illogical to make the availability of §437h dependent upon such an adventitious circumstance as the identity of the plaintiff or whether the constitutional challenge is to be raised offensively or defensively. For it is manifest that the importance of and need for prompt appellate resolution of constitutional challenges to the Act—the desideratum of §437h—is necessarily a function not of the identity of a particular plaintiff, but solely of the nature of the challenge to the Act. *See* App., *infra* at 5-10.

In sum, properly construed, §437h is not, as the FEC has twice unsuccessfully argued, a statutorily imposed *restriction* on the availability of expedited judicial review in the Courts of Appeals and this Court, but rather represents Congress's desire to *expand* traditional notions of standing so as to allow certain potential plaintiffs who, but for §437h, might not have standing, to institute actions in the district court. *See* App. *infra*, at 9-11.

II.

THE QUESTIONS ARE SUBSTANTIAL

As noted in our Jurisdictional Statement, despite the deep division in the court of appeals regarding the constitutionality of §441b(b)(4)(D), the entire court unhesitatingly agreed that "the questions presented . . . are '*substantial*', ..." *See* Jurisdictional Statement at 7. In our Statement, we also adverted to the FEC's unqualified concession that the case presented "serious constitutional issues" which "go to the heart of the [Federal Election Campaign] Act" and which have "potential and far reaching impact on the . . . Act . . . ." *Id.* Finally, we explored the irreconcilable conflict between the Department of Jus-

tice and the FEC regarding the permissible reach of the Act. *Id.* at 8-9.

In its brief, the FEC has neither disavowed the findings of the court of appeals nor its prior admissions in the district court. It has neither disclaimed nor sought to minimize the existence or the extent of the conflict between its construction of the Act and that of the Department of Justice. Nor has it made any attempt to answer or refute a single argument raised by the dissenting judges in the Seventh Circuit or in our Jurisdictional Statement. Finally, and perhaps most importantly, the FEC has ignored the detailed findings of the district court that the Act has materially, substantially and adversely affected the First Amendment rights of not only the plaintiffs but of vast numbers of American citizens. *See* Jurisdictional Statement at 2-3; 10-11; 13-14; 17.

The mode of presentation employed by the FEC is not, of course, new. What is disturbing is that it should be employed by the government in this Court in a case implicating core First Amendment values. By its superficial presentation, the FEC has not only abdicated its responsibilities to this Court, but has virtually conceded the substantiality of the questions raised by this appeal.

In place of principled analysis, the FEC has merely paraphrased the conclusions of the majority of the court of appeals without making the slightest attempt to analyze those conclusions or the basis upon which they purportedly rest. It belabors the obvious to posit that the substantiality, *vel non*, of a question brought to this Court for review cannot be determined merely by reiterating the ultimate conclusions of a majority of a divided court of appeals without regard to the validity and intrinsic merit of those conclusions. *See* R. Stern and E. Gressman, Supreme Court Practice 319-27 (5th ed. 1978).

The FEC's barren, unprincipled claim that the questions in this case are insubstantial not only ignores the intimations of *Buckley* v. *Valeo* and a half century of doctrinal development of the First Amendment, but puts out of view the palpable and devitalizing impact which §(D) has had on the political process and on the First Amendment rights of literally millions of our citizens. Indeed, with the possible exception of *Buckley* itself, perhaps never before in its history has this Court considered a statute which in its operative effect has affected the First Amendment rights of so many as has §(D). Thus, plenary review is not simply appropriate—it is, we respectfully submit, mandatory.[5]

CONCLUSION

Probable jurisdiction should be noted and the case set down for briefing and argument.

Respectfully submitted,

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[5] Despite the FEC's intimations to the contrary, the questions involved in this case are essentially ones of first impression, having been considered only by the court below which was sharply divided in its ultimate holding.

APPENDIX

APPENDIX

BREAD POLITICAL ACTION COMMITTEE et al.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION et al.,
Defendants-Appellees.

No. 78-1150.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 8, 1978.

Decided Jan. 12, 1979.

Jeffrey N. Cole, Chicago, Ill., for plaintiffs-appellants.

Charles N. Steele, Federal Election Commission, Washington, D. C., for defendants-appellees.

Before FAIRCHILD, Chief Judge, and SWYGERT and TONE, Circuit Judges.

SWYGERT, Circuit Judge.

This interlocutory appeal requires us to construe the extraordinary provision for expedited judicial review of the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431 *et seq.* Plaintiffs-appellants are a number of trade associations and their political action committees. The defendants are the Federal Election Commission, the Secretary of the Senate, the Clerk of the House, the members of the Commission, and the Attorney General. The plaintiffs seek to challenge the constitutionality of various provisions of the Act which they say restrict their financial activities in the political arena. The issue on this appeal

is whether these plaintiffs may invoke the expedited review provision, § 437h,[1] and have their constitutional challenges certified for initial review by this court sitting en banc.

After filing their complaint in the district court, plaintiffs moved, under § 437h, for immediate certification to this court of the constitutional questions presented. The district court held a hearing and rendered an oral decision denying the motion to certify. The court construed § 437h

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[1] 2 U.S.C. § 437h provides:

§ 437h. Judicial review.—Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.

(a) The Commission, the national committee or any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Appeal to Supreme Court; time for appeal

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

Advancement on appellate docket and expedited disposition of certified questions

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

to restrict the availability of expedited review to the three types of plaintiffs listed in the first sentence of § 437h(a): "[t]he [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote [in a Presidential election]." The court held that since "the plaintiffs in this action do not fall within the group specified in § 437h, . . . they are not entitled to . . . expedited review . . . ." The district court did not dismiss the action, however, holding that it did have jurisdiction over appellants' claims under its ordinary federal question jurisdiction, 28 U.S.C. § 1331.

Plaintiffs then moved for the district court to certify the question of whether appellants were plaintiffs entitled to invoke § 437h for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted that motion and this court granted appellants' subsequent motion for leave to take this appeal.

I.

Construction of § 437h must begin with the language of the statute itself. Subsection (a) of §437h is the provision for instituting actions for review of the Act and for certifying constitutional questions to the court of appeals sitting en banc. Subsection (a) provides:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

It is clear that the plaintiffs here do not fall within any of the three types of plaintiffs described in the first sentence of subsection (a). The question is, therefore, whether Congress intended to exclude all other plaintiffs from invoking the provisions of § 437h by naming the three types found in the statute. The district court so held and the defendants support that position on this appeal. The plaintiffs, on the other hand, contend that the purpose of § 437h is to provide expedited review of all challenges to any of the provisions of the Act and that Congress intended to expand notions of standing to achieve that purpose. They conclude that the purpose for naming the three types of plaintiffs specified was not to exclude other plaintiffs, but to remove any doubt that the specified plaintiffs would have standing.

The language of subsection (a) supports the plaintiffs' construction. The first sentence itself, after specifying three types of eligible plaintiffs, authorizes suits "to construe the constitutionality of *any provision* of this Act" (emphasis added). This language indicates that Congress intended that constitutional challenges could be brought in the federal courts under § 437h against every part of the Act. On the other hand, if the specification of the three types of plaintiffs limits the use of § 437h to those plaintiffs, it is unlikely that every provision of the Act could be challenged under § 437h. This case illustrates the point.

The plaintiffs in this case seek to challenge provisions of the Act which regulate the activities of trade associations. If these plaintiffs cannot invoke § 437h to challenge these provisions, it is doubtful that anyone could do so. This is so because in enacting subsection (a), Congress could not grant the specified plaintiffs standing beyond the limits of Article III. Thus, even the specified plaintiffs would have to show a sufficient "personal stake" in the

outcome of such a suit to satisfy constitutional "case or controversy" requirements. *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In a suit like this one—challenging provisions regulating trade associations and their political action committees—it is unlikely that any of the specified plaintiffs could show any "personal stake" in the outcome. If not, under the district court's construction, § 437h would be unavailable to challenge the provisions challenged here and the apparent Congressional intent to provide expedited review to attack "any provision" of the Act would be subverted.

The second sentence in subsection (a) contains additional support for the plaintiffs' position. That sentence requires the district court to "certify *all* questions of constitutionality of this Act" (emphasis added) to the court of appeals sitting en banc. This language further focuses Congress' intent on the questions presented in a suit such as this, rather than on the identity of the plaintiffs. The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedure to apply broadly to challenges to the Act.

Reading the two sentences together, we find an expressed Congressional intent that § 437h apply to all questions of the constitutionality of any provision of the Act. As noted above, this purpose would be severely restricted if the first sentence is read as an exclusive grant of standing to the three specified plaintiffs to obtain expedited review.

Further support for the plaintiffs' position is found in the overall structure provided in the Act for judicial determination of questions arising under the act. Section 437h provides for actions brought specifically to decide

the constitutionality of the Act. Section 437g contains procedures for enforcement of the Act.[2] A comparison

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[2] U.S.C. § 437g provides, in pertinent part:

Enforcement—Practice and procedure

(a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred may file a complaint with the Commission. . . .

(2) The Commission, upon receiving a complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of Title 26, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3)(A) Any investigation and paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section, of reports and statements filed by any complainant under this subchapter, if such complainant is a candidate. . . .

(5) . . .

(B) If the Commission is unable to correct or prevent any such violation by . . . informal methods, the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(C) In any civil action instituted by the Commission under subparagraph (B), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an

(footnote continued)

of the schemes for review under §§ 437g and 437h shows the difficulty with the district court's construction of § 437h.

(footnote continued)

amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of Title 26.

(9)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made—

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in a part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 and Title 28.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than actions brought under this subsection or under section 437h of this title). . . .

Under § 437g, either the Commission[3] or an individual[4] may bring a civil action in a district court to enforce the Act. The decision in such an action may be appealed to the court of appeals, but will only be reviewed by the Supreme Court on a writ of certiorari.[5] Under § 437g-(a)(11), an enforcement action must be advanced on the calendar of each court ahead of all other cases, save those filed under § 437h. Since challenges to the Act could be raised as defenses in such an enforcement proceeding, § 437g provides an alternative method for obtaining judicial review of the Act. Such defensive challenges to the Act could be on either constitutional or non-constitutional grounds. And since the entire enforcement proceeding would be advanced on the calendar of each court hearing the matter, both constitutional and non-constitutional challenges raised as defenses would receive this partially expedited review.

In contrast, § 437h provides that an action brought expressly to challenge the Act on constitutional grounds should receive the even more expedited review outlined in that section and that such actions may be taken to the Supreme Court by direct appeal. And § 437g(a)(11) makes it clear that Congress intended § 437h actions to take precedence even over enforcement proceedings.

The district court's construction would add a third method for reviewing the Act. Under that construction, the present plaintiffs' constitutional challenge would not be reviewed under either of the statutorily expedited methods.

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[3] 2 U.S.C. § 437g(a)(5)(B).

[4] 2 U.S.C. § 437g(a)(9).

[5] 2 U.S.C. § 437g(a)(10). Subdivision (10) also provides for review by the Supreme Court by the certification procedure of 28 U.S.C. § 1254(3).

It would proceed through normal three-tier review under ordinary federal question jurisdiction. Thus, *non*-constitutional challenges in enforcement proceedings would receive more expeditious review than would *constitutional* challenges brought by plaintiffs other than the three specified in § 437h(a). While Congress could have discerned differences in the need for expedited review among constitutional challenges raised by different parties, it is difficult to conceive a rationale for viewing any non-constitutional challenge as more urgent than one raising constitutional questions, regardless of the identity of the plaintiffs. Moreover, there is no indication in the language of the statute that Congress did in fact perceive a greater need for speed or ultimate Supreme Court review of constitutional questions raised by the specified plaintiffs than constitutional questions raised by others.

Based on the language of § 437h and the overall scheme of judicial review provided in the Act, we hold that § 437h applies to these plaintiffs' constitutional challenge to certain provisions of the Act and that they may invoke the expedited review provision. As we have noted, the language used and the nature of the review mechanism provided in § 437h show a Congressional intent to allow speedy judicial review of all possible constitutional challenges to any provision of the Act and to make certain that such challenges would be decided by the Supreme Court. Thus three Congressional purposes are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act. The district court's construction that Congress intended to restrict standing to invoke § 437h to the specified plaintiffs is inconsistent with these expressed purposes.

There is no indication in the language of the statute of any intent to exclude any plaintiffs who have standing under traditional rules. In our view, Congress intended to

expand the limits of standing under § 437h to the extent possible under Article III. This intent is wholly consistent with the expressed purposes of the statute. Under this view, Congress' purpose for naming the three types of plaintiffs found in subsection (a) was to insure, within constitutional limits, their standing to raise constitutional challenges to the Act. Congress may well have entertained doubts about the standing of the specified plaintiffs to challenge many of the Act's provisions.[6] And Congress

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[6] At oral argument, counsel for both sides agreed that without their enumeration in § 437h(a), serious questions could be raised about the standing of each of the specified plaintiffs. The standing of the Commission to challenge the constitutional validity of the statute it was created to enforce may have been doubted on the basis of conflicting case law. Older cases held that an agency or officer has no standing in the federal courts to challenge the statute the agency or officer is bound to enforce. *Columbus & Greenville R. Co.* v. *Miller*, 283 U.S. 96, 51 S.Ct. 392, 75 L.Ed. 861 (1931); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915); *Marshall* v. *Dye*, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206 (1913); *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450 (1908); *Smith* v. *Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 (1903). *See also Akron Bd. of Ed. v. Bd. of Ed. of Ohio*, 490 F.2d 1285, 1296 (6th Cir. 1974) (Weick, J., dissenting). The authority of these cases is now questionable, although they have not been overruled. *See Bd. of Ed.* v. *Allen*, 392 U.S. 236, 241 n.5, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *City of New York* v. *Richardson*, 473 F.2d 923, 933 (2nd Cir. 1973); *Aguayo* v. *Richardson*, 473 F.2d 1090, 1100 (2nd Cir. 1973). *See generally* Hart and Wechsler, The Federal Courts and The Federal System 182 (2d ed. 1973).

Congressional doubts about the standing of political parties and voters may have been based on the fact that challenges to much of the Act by such plaintiffs might be viewed as asserting either "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" or the rights of third parties. Such a view might lead to a finding of no standing under prudential rules. *Warth* v. *Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

apparently thought that it was important that those plaintiffs, in addition to others with obvious personal interest in the restrictions imposed by the Act,[7] be allowed to test the constitutionality of the Act. Each of the specified plaintiffs has a generalized interest in the operation of the entire Act, which may not have provided standing under the prudential rules of the federal courts, *see Warth* v. *Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), but which Congress may have deemed sufficiently important, due to the central role of each specified plaintiff in the election process, to justify a Congressional grant of standing.[8] *Warth* v. *Seldin*, *id.* at 501.

II.

The sparse legislative history of § 437h adds little to the analysis of its purpose.[9] As to case law, the decisions

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[7] Persons with this kind of interest in the Act would include candidates and the plaintiffs in this case due to the direct regulation of their conduct by the Act. This direct action of the statute upon such persons brings them squarely within traditional notions of standing to assert the invalidity of the imposed restrictions.

[8] It should be noted that the doubts about standing discussed here are distinguished from those expressed earlier regarding the standing of the specified plaintiffs to undertake the challenges asserted by the plaintiffs here. There it was doubted whether the specified plaintiffs could show a sufficient personal stake to have standing in the constitutional sense to attack those provisions. If not, § 437h could not be invoked by anyone to mount such an attack if the district court's narrow reading of the statute were accepted. Here we discuss doubts possibly held by Congress under prudential standing rules, as to the standing of the specified plaintiffs to seek review of any provision of the Act. It is clear from *Warth*, *supra*, that Congress had the power to remove any such doubts and to grant standing to the limits of Article III.

[9] Only two references to § 437h in the debates over the Act have been cited by the parties or found by our research. In introducing the amendment which added § 437h, Senator Buckley said:

(footnote continued)

in *Buckley* v. *Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.E.d.2d 659 (1976) *aff'g in part and rev'g in part*, 171 U.S.App. D.C. 172, 519 F.2d 821 (1975), strongly support our construction of § 437h. In *Buckley*, the original plaintiffs included four individuals and the following organizations: the Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. It is clear that few, if any, of these organizations could be classified as the "national committee of any political party" so as to fit within the specified groups in § 437h. The district court in *Buckley*, in certifying

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(footnote continued)

> [I]t is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional question I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong.Rec. 10562 (1974). And in the House, Representative Frenzel said:

> I believe within this conference report there are at least 100 items questionable from a constitutional standpoint. Any time we pass legislation in this field we are causing constitutional doubts to be raised. . . .
>
> I do call the attention of the gentleman to the fact that any individual under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court.

120 Cong.Rec. 35140 (1974). Neither statement addresses the issue of who may invoke § 437h and who may not; both merely restate the purposes expressed in the statute that review be speedy and that the questions be answered by the Supreme Court.

the case to the court of appeals, impliedly read § 437h as the district court here did, as an exclusive grant of standing to the parties specified. The *Buckley* court held that the four individual plaintiffs had standing and explicitly left to the court of appeals the question of the standing of the organizational plaintiffs.[10]

The court of appeals, however, expressed no similar reservations about the standing of the organizational plaintiffs and remanded the case to the district court for the taking of necessary evidence and certification of resulting constitutional questions, without dismissing any of the named plaintiffs. Moreover, the court of appeals granted leave to intervene to three more organizations, the Center for Public Financing of Elections, Common Cause, and the League of Women Voters, none of which even arguably fit within the groups specified in the statute. Finally, in its opinion on the merits, the court of appeals described § 437h as "a broad grant of legislative standing to sue . . ." and considered only whether that grant was so broad as to violate the Article III case or controversy requirement, without reference to the standing of the or-

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[10] After holding that the individual plaintiffs had standing to seek review under § 437h, the district court said:

> It is not so clear, however, that each of the five organizational plaintiffs possesses the same requisite standing. This is so because obviously none is eligible to vote for the office of President in any election. It is unclear, in the present procedural posture of plaintiffs' case, whether any of the named organizational plaintiffs may be "the national committee of any political party" within the meaning of the relevant statute. Since at least some of the plaintiffs have the requisite standing, and since the ultimate decision as to the standing of others may have to await further exploration, in the interests of time, this Court defers to the Court of Appeals on that issue.

ganizational plaintiffs still present in the case. 519 F.2d at 850-851.[11]

The strongest authority for our decision is the Supreme Court's treatment of the standing issue in *Buckley*. After noting the presence of the organizational parties to the case, the Court turned to the issue of jurisdiction and said:

> It is clear that Congress, in enacting [§ 437h], intended to provide judicial review to the extent permitted by Art. III. In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake"[10] in a determination of the constitutional validity of each of the challenged provisions. . . .

424 U.S. at 11-12, 96 S.Ct. at 631. Footnote 10 from the quoted part of the opinion stated in part: "This Court has held, for instance, that an organization 'may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation.' *NAACP* v. *Alabama*, 357 U.S. 449, 458, 78 S.Ct. 1163,

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[11] We are aware that two members of the D.C. Circuit appear to have since espoused a narrow construction of the standing granted by § 437h. *See Clark* v. *Valeo*, 182 U.S.App.D.C. 21, 40, 559 F.2d 642, 661 (1977) (Leventhal, J., concurring); *id.* 182 U.S.App. D.C. at 46 and 53, 559 F.2d at 667 and 674 (Robinson, J., dissenting). We regard these apparent views as inconsistent with the position taken by the whole court in *Buckley* in accepting all of the original plaintiffs and in allowing intervention by other organizations. Cf. *Clark*, *id.* 182 U.S.App.D.C. at 32-36, 559 F.2d at 653-657 (Tamm, J., concurring) (three judges discussed the standing of the United States to invoke § 437h without reference to the list of plaintiffs in the statute and concluded that the United States lacked standing because it could not show any "injury in fact" to satisfy Art. III.)

1170, 2 L.Ed.2d 1488 (1958). . . ." We cannot read the quoted language as other than a clear holding that Congress intended to expand traditional notions of standing to the limits of Article III. And footnote 10 makes it clear that organizations may have standing under § 437h if they otherwise meet the requirements for "associational standing." *See Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).[12]

In sum, the decisions in *Buckley* fully support our construction of § 437h(a) and our holding that the plaintiffs in this case have standing to invoke its expedited review procedure.

III.

The district court, because of its jurisdictional stance, refused to certify any constitutional questions raised by the complaint. In addition, counsel for the defendants represented at argument that there are disputed fact

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[12] We have held recently that a trade association had "organizational standing" to challenge local ordinances authorizing inspection of meat delivery vehicles, applying the test set out in *Hunt, supra*. *Chicago-Midwest Meat Association* v. *City of Evanston*, 589 F.2d 278 (7th Cir. 1978). It is clear that some of the trade associations here also satisfy the *Hunt* test. The complaint alleges that the challenged provisions of the Act violate the First Amendment rights of the organizations and their members, some of whom are individuals, by interfering with the organizations' ability to gather and expend funds to express their views on political matters. From this it appears that (1) the individual members of the organizations would have standing under § 437h and could show a personal stake in the constitutional questions raised; (2) the First Amendment questions are germane to the political purposes of the organizations here; and (3) since the complaint seeks only declaratory and injunctive relief, participation of the individual members is not required. *See Chicago-Midwest Meat Association, supra*, 589 F.2d at 280-281.

issues in the case. For these reasons, the case will be remanded to the district court for the certification required by § 437h(a). On remand the district court should: (1) identify the constitutional and fact issues raised by the complaint; (2) take whatever evidence the court finds necessary to a decision of those issues; (3) make findings of fact; and (4) certify the assembled record and the constitutional questions arising therefrom to this court for decision pursuant to § 437h. The district court should, of course, expedite the above procedures to the greatst possible extent.

The order of the district court denying certification under 2 U.S.C. § 437h(a) is reversed and the case is remanded for further proceedings consistent with this opinion.

TONE, Circuit Judge, concurring.

If it were not for *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), I would have more doubt about the meaning of the statutory language than is expressed in the opinion of this court. The view adopted by the Supreme Court in that case, however, governs us, and I therefore concur in the judgment.